Supreme Court, U.S.
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92-1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE ESTATE OF ALBERTO OSPINA BY HIS EXECUTOR, THOMAS C. COUGHLIN, and MARGOTH OSPINA and WILLIAM OSPINA and TAMARA OSPINA,

Petitioners,

against

TRANS WORLD AIRLINES, INC.,

Respondent,

FRIGITRONICS, INC.,

Intervenor.

MOHSEN YOUSSEF,

Petitioner,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented.

1. Whether an airline should receive shelter from liability under the Warsaw Convention if it deliberately and willfully abandons procedures for screening passengers that it had agreed with the United States government to follow, and indeed had considered essential and had followed for many years?

2. Whether the safety of the traveling public on United States international airlines requires that an international air carrier do more than simply comply with existing written administrative safety regulations and the safety laws of the foreign countries to which the airline flies, when the airline has agreed with the United States government that additional precautions will be followed and the airline itself acknowledges that certain specific additional precautions are necessary?

3. Whether the unprecedented, narrow test of "willful misconduct" under the Warsaw Convention articulated by the circuit panel should be reversed by this Court since it conflicts with broader interpretations by the Circuit Courts of the District of Columbia Circuit and the Eleventh Circuit, which are supported by the plain text of the Warsaw Convention?

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IN THE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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[1] The caption contains the names of all of the parties to the proceedings below.

The petitioners The Estate of Alberto Ospina by his Executor, Thomas C. Coughlin, and Margoth Ospina and William Ospina and Tamara Ospina and Mohsen Youssef (collectively "petitioners") respectfully pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit filed on September 3, 1992.

Opinions Below.

The majority and dissenting opinions in the United States Court of Appeals for the Second Circuit are reported at 975 F.2d 35.

The decision of the United States District Court for the Eastern District of New York is reported at 778 F. Supp. 625.

The above officially reported opinions are reproduced in the appendix hereto. In addition, in view of the evidence related to sensitive airline security information, District Judge Nickerson, who was sitting by designation, filed an unreported supplemental dissenting opinion under seal with the Court. For national security reasons, that supplemental opinion is not reproduced in petitioners' appendix.

Jurisdiction.

On September 3, 1992, the United States Court of Appeals for the Second Circuit by a 2-1 decision reversed the jury's verdicts in petitioners' favor awarding compensatory damages for personal injury and wrongful death and held that petitioners' recovery was limited to $75,000 under the Warsaw Convention.

Petitioners' timely motion for rehearing or rehearing in banc was denied by the United States Court of Appeals and entered therein on December 2, 1992.

This petition for certiorari timely was filed within 90 days of the United States Court of Appeals' denial of petitioners' motion for rehearing.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

The Warsaw Convention, 49 U.S.C. § 1502 (note), provides in relevant part:

Article 17

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

* * *

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

* * *

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to willful misconduct.

Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocal. Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

* * *

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in

> accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, . . . These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol.
>
> * * *

49 U.S.C.A. § 1502 (note) at 437.

Statement of the Case.

Petitioners invoked the subject-matter jurisdiction in the United States District Court in the Eastern District of New York under the Warsaw Convention, 49 U.S.C. § 1502 (note), Article 28(1), and based on the parties' diversity of citizenship and the amount in controversy under 28 U.S.C. § 1332.

This case involves the proper interpretation and application of the legal standard of "willful misconduct" contained in the Warsaw Convention. The record evidence of Trans World Airline's ("TWA") deliberate or, at a minimum,

reckless acts and omissions is substantial and convincing. Indeed, the evidence was so found by a unanimous jury, the presiding District Court judge and the dissenter on the circuit panel. As discussed below, the circuit panel majority applied an unprecedented, erroneously narrow interpretation of the "willful misconduct" standard, thereby creating a conflict with interpretations by the District of Columbia and Eleventh Circuit Courts of Appeals. The circuit panel also erroneously and unfairly substituted its view of the evidence for that of the unanimous jury and presiding judge below, thereby triggering a need for this Court to exercise its power of supervision.

A bomb which was carried aboard TWA Flight 840 out of Cairo by terrorist May Elias Mansour ("Mansour") exploded near Athens airport on April 2, 1986 killing Alberto Ospina and injuring several passengers, including Mohsen Youssef. The evidence established that TWA had identified Mansour as a possible terrorist (known in the industry as a "profile selectee") because she met certain security criteria developed by TWA and the FAA. Nevertheless, in its haste to add one more passenger to the flight, which was about to depart, TWA deliberately decided to allow Mansour to board the plane without enforcing its requirement, agreed to with the U.S. Government, that all passengers be subjected to redundant screening by TWA personnel. Mansour was thus screened only by Egyptian personnel who had been determined by the U.S. Government and by TWA to be untrustworthy due to corruption and known complicity with terrorists. Mansour's person and carry-on bag were never electronically screened or checked by hand-held metal detectors by TWA and the bomb she was carrying was not discovered.

TWA's deliberate failure to carry out its preboarding screening process on a suspected terrorist, standing alone,

constituted willful misconduct sufficient to impose liability on TWA for compensatory damages above the $75,000 Warsaw Convention limits. The jury so found, and that finding of willfulness was also supported by numerous other facts, including the proof that despite TWA's responsibility to "thoroughly" search all cabins at originating stations in that part of the world due to heightened terrorist activity, TWA in fact had no procedures in place which would uncover a bomb once it was brought onto a flight. Despite this evidence, the circuit panel in this case held by a 2 to 1 vote (Nickerson, J. dissenting) that no reasonable jury could have found TWA's conduct to be willful and reversed the judgment below. We submit this was error. As aptly stated by Judge Nickerson in his dissenting opinion at pp. 5, 6, 7 (10a-12a)[2]:

> TWA's abandonment of an established screening procedure was not the result of inadvertence or negligence. It was a deliberate action made with full knowledge of the probable consequences. In a word, it was willful.
>
> * * *
>
> Redundant screening by TWA was not some unimportant matter instituted out of caprice or whim. Common sense suggests that it was implemented for some purpose. As evidenced by TWA's continuation of redundant screening over the years and by other information which remains under seal, it

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[2] Numbers in parentheses refer to pages in petitioners' appendix annexed hereto.

> was not something that TWA regarded as trivial or cosmetic. TWA knew it had to rely on its own defenses.
>
> * * *
>
> ... [T]he record shows that once TWA decided to abandon the requirement for redundant screening, TWA had no adequate procedures in place to repair the breach. This fact simply emphasizes the importance of TWA's preboarding screening.
>
> * * *
>
> I do not agree that the Warsaw Convention shelters TWA from liability when it willfully acts to abandon a screening procedure implemented by agreement with the United States government, a procedure that TWA knew under the agreement it "had to continue" and that TWA itself deemed essential.

REASONS FOR GRANTING THE WRIT.

Every day thousands of American citizens are passengers on international flights of United States air carriers. These Americans are a prime target of terrorist groups who would view the destruction of a United States flight and the death of its passengers and crew as a great achievement in the furtherance of their political ends. This country thus has a strong public interest in requiring carriers such as TWA to develop and implement safety measures to protect American passengers against terrorist attacks on international flights.

In his dissent below, Justice Nickerson succinctly framed the issue on appeal as follows:

"[T]hese cases present not just an issue of whether there was sufficient evidence to support the jury verdict, but also an important question of law which has serious implications for the safety of passengers on United States international air carriers.

"That question of law is whether such a carrier should receive shelter from liability under the Warsaw Convention if it deliberately and willfully abandons procedures for screening passengers that it had agreed with the United States government to follow, and indeed had considered essential and had followed for many years." (Dissenting Opinion of Judge Nickerson at pp. 1-2.) (7a-8a)

The Circuit Court's decision
conflicts with other Circuits

This Court should grant petitioners' writ because the decision rendered by the Court below is in conflict with decisions by the United States Courts of Appeals for the District of Columbia Circuit and the Eleventh Circuit. This Court should also grant petitioners' writ in the proper exercise of its power of supervision because the court below so far departed from the accepted role of an appellate court by substituting its view of the evidence for that of the fact finders and in reversing the jury's findings, which were confirmed by the presiding District Court judge, of willful misconduct by TWA.

Willful misconduct in the context of the Warsaw Convention is defined as the intentional performance or omission of an

act (1) with knowledge that the performance or omission of that act will probably result in damage or injury or (2) in a manner from which could be implied a reckless disregard for the probable consequences of the performance or omission of the act. Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122, 124 (2d Cir. 1951).

Here, a unanimous jury found sufficient evidence to support a verdict of willful misconduct against TWA. Thereafter, Judge Weinstein refused to set aside the verdict. Although Judge Weinstein admittedly did not specifically recite the extensive evidence supporting a finding of liability against TWA, the record clearly shows that Judge Weinstein was a vigilant participant in the trial and he unequivocally concluded that "the jury verdicts, finding TWA's delicts the equivalent of willful misconduct, were more than justified," and that Mansour "was allowed aboard in flagrant violation of many basic security measures." (17a) To the extent Judge Weinstein did not recite the many facts upon which a finding of liability rests, Judge Nickerson clearly and completely did so in his two dissenting opinions on appeal.

Petitioners respectfully submit that the unanimous jury, Judge Weinstein and Judge Nickerson all correctly concluded that a finding of willful misconduct and not mere negligence is amply supported by the evidence. Given the importance of the public policy issues presented herein, the conflict between the standard of "willful misconduct" articulated by the circuit panel in this case and the standard articulated in other circuits, and the difference of opinion between the two majority judges and all of those noted above who have found that the evidence supports a finding of liability here against TWA, petitioners respectfully submit that this case should be reviewed on a writ of certiorari.

The circuit panel majority's decision articulates an unprecedented test as to what constitutes "willful misconduct." According to the panel, the test of "willful misconduct" involves whether the airline has "complied with all positive FAA safety procedures and regulations as well as the laws of the countries" in which the airline operates. Nothing in the text or legislative history of the Warsaw Convention justifies such a narrow construction -- nor has any prior court reached such a conclusion.

In fact, the text of the Warsaw Convention indicates just the opposite, namely, that an airline must prove that it took all necessary steps to avoid injury or that it was impossible to do so -- not that it simply complied with existing adminstrative regulations and foreign safety laws. Thus, the Convention expressly provides in part that "[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." 49 U.S.C. § 1502 (note), Article 20(1) (emphasis added.).

Indeed, prior cases from other circuits have implicitly analyzed the airline's liability for "willful misconduct" based on whether the evidence indicated that the airline took all necessary measures to avoid the injury or that it was impossible to take such measures.

In KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961), a unanimous panel in the District of Columbia specifically refused to be bound by the limits of the Irish government's regulations as to when life vest instructions should be given to fulfill the duty of care the airline owed to its passengers. Id. at 779. The court further concluded that a jury could reasonably find willful misconduct based on a radio officer's failure

to send a "Mayday" distress signal in the seconds before the aircraft crashed when he was thrown from his seat because he was not wearing a seatbelt. The court also concluded that a jury could reasonably find willful misconduct based on various "plainly available" alternatives to the crew to rescue a passenger stranded on the tail of the airplane. Id. at 780.

Similarly, in Butler v. Aeromexico, 774 F.2d 429 (11th Cir. 1985), the Eleventh Circuit Court of Appeals did not measure the airline's conduct based upon "positive FAA safety procedures and regulations" and the laws of the countries in which the airline operated. Instead, the court determined whether there was "substantial and convincing" evidence to support the inference "that the crew had intentionally performed acts with knowledge that under the circumstances injury might result." Id. at 431. The court then discussed the series of negligent acts or omissions by the crew leading to the crash and the fatal outbreak of fire. Id. at 431-32.

In both cases above, the standard of willful misconduct was based on an analysis of a series of instances of negligence which led to a reasonable inference that the airline had acted with "reckless disregard of the consequences" or "a deliberate purpose not to discharge some duty necessary to safety." In neither case was there evidence, as in this case, that the airline had willfully abandoned a safety procedure implemented by agreement with the United States government, which the airline knew under the agreement it "had to continue" and which the airline itself deemed essential. Thus, the evidence adduced in this case presents a much more substantial and convincing case of "willful misconduct" by the airline and should not have been the vehicle for the circuit panel to articulate an unprecedented, narrow construction of that legal standard.

The circuit panel focused on the evidence that TWA failed to use two procedures to search the cabin of the plane which, if used by TWA, would have uncovered the bomb that exploded on Flight 840. The Court's decision reveals that the majority apparently misapprehended petitioners' arguments and overlooked the evidence of TWA's "willful" misconduct, which evidence was clearly identified and described by Judge Nickerson in his dissenting opinion.

The evidence of TWA's "willfulness"

Petitioners do not claim that willfulness was shown solely by TWA's failure to check the plane cabin with bomb detecting dogs or to search under Mansour's seat cushion during the layover in Rome -- although there clearly was evidence that such procedures were called for and were recognized by TWA as necessary at the Rome airport at that particular time when terrorist threats against the United States were intense. In April, 1986, TWA knew of an extraordinary threat to security due to escalating conflict between the United States and Libya, resulting in public terrorist threats against civilians and causing the FAA to warn air carriers to take immediate steps to ensure that their security programs were working properly and effectively.

The evidence of TWA's "willful" misconduct lies in its intentional abandonment of an established redundant screening procedure which TWA itself had decided was necessary at the Cairo airport (9a). After TWA Flight 847 was hijacked in June 1985, TWA contracted with Control Risk, a security firm, to conduct a review of TWA's security at several airports including Cairo. Control Risk's written report concluded that TWA had to "look to (its) own defenses" at the Cairo airport because of the high degree of corruption and the influence of

fundamentalist political activity reaching into the armed services and police, which were responsible for airport security. Thus, because TWA knew Egyptian security was untrustworthy, TWA developed a system of redundant screening of all passengers (not just profile selectees) using its own hand-held metal detectors and hand baggage x-ray screening machines. To protect the traveling public, TWA agreed with the United States government to assume responsibility for filling the void created by the untrustworthy Egyptian security.

TWA's abandonment of the redundant screening in this case constituted "willful" misconduct because the redundant screening procedure was deliberately and incredibly abandoned with an individual whom TWA's own employees had identified as a possible terrorist (See 8a-9a). Ms. Mansour, the terrorist, who immediately after the bombing appeared on Lebanese television gloating about it, had been identified by TWA as a "profile selectee" according to security criteria developed by TWA and the FAA.

Mansour arrived at the airport only 30 to 40 minutes before the scheduled departure. TWA's lead customer service agent in Cairo, Hany Silwanis, recognized immediately simply from looking at Mansour's ticket and passport that she was a profile selectee and marked her boarding pass with a "P" identifying her as such. Silwanis then informed another TWA employee, Azzab, that Mansour was a profile selectee and stressed that she should be thoroughly searched and screened. After the untrustworthy Egyptian screening was completed, Azzab brought Mansour to Gate 2 for TWA's own screening. However, Egyptian authorities had closed Gate 2 because TWA had told them the boarding for the flight was finished.

At this point, TWA did not ask the Egyptian authorities to reopen Gate 2 so that Mansour could be thoroughly searched and screened by TWA's own personnel, as TWA itself knew was necessary; nor did it tell Mansour that she would have to take the next flight. Instead, Mansour was driven by TWA to Gate 5 and allowed to be screened by the untrustworthy Egyptian authorities. Thus, TWA raced Mansour through the screening process, deliberately abandoning its own screening of a suspected terrorist, in an apparent effort to add one more passenger to the manifest (only 17 people were aboard a plane that carries about 140 people) and to avoid delaying the plane's departure.

As Judge Nickerson noted in his dissent, TWA's total lack of any security procedures beyond its redundant screening highlights the importance of that redundant screening and TWA's recklessness in deliberately abandoning it, particularly since it was abandoned to rush a suspected terrorist onto the plane (10a). The deliberate abandonment of the redundant screening arguably might not have constituted willful negligence if TWA had implemented any of several known backup safety precautions. However, once Mansour was allowed to board the plane without redundant screening, the success of her mission was virtually guaranteed because TWA had failed to adopt any of the known security measures to repair the breach in security.

TWA thus had no policy or practice of advising the in-flight crew or those responsible for searching the aircraft that a profile selectee had boarded. The crew on Mansour's flight was therefore not told that she was a potential terrorist; nor did it know the significance of the "P" on her boarding pass. Likewise, the crew charged with "thoroughly searching" the plane was not told that seat 10-F had been occupied by a

potential terrorist so that they could simply lift her seat cushion and search the cabin in her vicinity to ensure that she had not left a bomb behind (See 11a). The FAA required airlines, including TWA, to thoroughly search planes for known threats. The evidence at trial showed that the only way to find bombs placed under seat cushions was to lift the cushions or use dogs.

Judge Nickerson succinctly summarized the evidence of TWA's "willfulness":

> The breakdown in TWA's security system first occurred when the TWA employee decided not to require the redundant screening. That breakdown might have been repaired if the TWA personnel in the cabin had been advised that Mansour was a profile selectee, thus posing a special risk, or if TWA personnel were trained to search for seat cushion bombs. There was thus a series of acts and omissions from which a jury could infer a reckless disregard of the probable consequences. But the most glaring evidence of willful misconduct was TWA's deliberate abandonment of the requisite redundant screening done not by Egyptians but by TWA personnel. [Sealed Dissenting Opinion at pp. 8-9.]

At a minimum, plaintiffs presented sufficient evidence to permit a jury to reasonably conclude that TWA's deliberate acts "implied a disregard of the probable consequences." Republic Nat'l Bank of New York v. Eastern Airlines, 815 F.2d 232, 238-39 (2d Cir. 1987). TWA's hurriedly escorting

Mansour, a profile selectee, through the screening process and onto the plane in order to add one more passenger and so as not to delay the departure of the flight constituted an obvious reckless disregard of the probable consequences of permitting a terrorist to board the plane unscreened by TWA. TWA's deliberate and reckless abandonment of its redundant screening requirement constituted willful misconduct even if such screening was not a written requirement of the FAA.

Moreover, although TWA's redundant screening procedure was not a written requirement of the FAA, the evidence at trial showed that it was a requirement agreed to by the FAA and TWA. TWA's claim that all that was required was "routine screening" by the Egyptian police rings hollow in the face of TWA's own report stating that TWA must "look to [its] own defenses" because of corruption in the Egyptian police and its complicity with terrorists.

The fact that TWA's agreement with the FAA was not in writing does not make it any less "a positive FAA safety procedure." As Judge Nickerson wrote:

> The fact that the requirement was not in writing does not diminish the significance of its abandonment. A written requirement may be easier to prove, but once it is proven the failure to follow a de facto requirement or procedure can rise to the level of

> willful misconduct. Cf. Republic Nat'l Bank of New York v. Eastern Airlines, 815 F.2d 232, 239-40 (2d Cir. 1987) (no willful misconduct for failure to follow de facto procedures where evidence failed to prove that defendant adopted such procedures).

Moreover, just because there is no specific regulation or law of a country requiring certain safety precautions does not shield an international airline from liability where circumstances mandate that the airline implement such safety measures -- particularly where the airline by its own past practices has demonstrated its own belief that such safety measures are required. See KLM Royal Dutch Airlines v. Tuller, 292 F.2d 775, 779 (D.C. Cir. 1961). That is precisely the case here with TWA's redundant screening. That screening had been TWA's established practice at the Cairo airport when it was recklessly abandoned here with Mansour.

Finally, willful misconduct can also be based on the cumulative effect of a number of acts or omissions. As the Second Circuit Court of Appeals stated in Tug Ocean Prince, Inc., 584 F.2d 1151 (2d Cir. 1978):

> It is . . . the combination of factors which together indicate a probable consequence of damage resulting from several failures to act, and by continuing to fail to act in the face of that probability, that indicates a reckless disregard of the consequences. While any one of the faults . . . [of the air carrier] alone may not constitute 'willful misconduct,' on the entire record the various inactions and gross disregard of the potential

> harm amount . . . to willful misconduct . . . .

Id. at 1164.

Here, as discussed above, TWA's deliberate abandonment of its redundant screening when faced with a suspected terrorist at a high-risk airport at a high-risk time was particularly reckless given TWA's complete failure to implement any of the known backup security measures once Mansour was allowed on board the plane. If the failure to screen Mansour, standing alone, did not constitute willful misconduct, and petitioners submit it did, then willfulness was clearly established in this case when the cumulative effect of TWA's various other "inactions and gross disregard of the potential harm" are considered. Tug Ocean, supra.

The Circuit Court improperly substituted its judgment for that of the Jury

In the proper exercise of this Court's power to supervise the inferior courts of the United States, this Court should grant petitioners' writ so as to right the injustice committed by the circuit court. As briefly shown above, the jury's finding of "willful misconduct" was clearly supported by substantial evidence adduced at trial. Although a different conclusion might also have been reasonable, that was not the proper standard of appellate review. The circuit court majority's decision itself plainly shows that, while recognizing that the case involved a necessarily fact-specific inquiry, it simply drew a different inference from the evidence and believed that another conclusion was more reasonable. This was an egregious error that should be corrected by this Court.

As this Court held in the seminal case of Lavender v. Kurn, 327 U.S. 645 (1946):

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. 327 U.S. at 653. See also Dennis v. Denver & Rio Grande Western Railroad, Co., 375 U.S. 208, 210 (1963).

Accordingly, petitioners respectfully request this Court to grant their writ in the proper exercise of its supervisory powers in view of the injustice caused by the circuit court majority's unprecedented interpretation of the Warsaw Convention and its egregious departure from the proper role of an appellate court in reviewing a jury's factual finding.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 2, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1134, 1155—August Term, 1991

(Argued May 21, 1992 Decided September 3, 1992)

Docket Nos. 91-9245, 91-9247

ALBERTO OSPINA, deceased, by his executors, Thomas C. Coughlin, Margoth Ospina and Tamara Ospina,

Plaintiff-Appellee,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant,

FRIGITRONICS INC.,

Intervenor.

MOHSEN YOUSSEF,

Plaintiff-Appellee,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant,

FRIGITRONICS INC.,

Intervenor.

Before:

MESKILL, *Chief Judge*, PRATT, *Circuit Judge*, and NICKERSON,* *District Judge.*

These are consolidated appeals from judgments of the United States District Court for the Eastern District of New York, Weinstein, *J.*, after jury verdicts in plaintiffs' favor. Defendant Trans World Airlines, Inc. argues that insufficient evidence existed to support the finding of willful misconduct necessary to impose liability in excess of that allowed under the terms of the Warsaw Convention.

Reversed. Judge Nickerson dissents in a separate opinion and filed a supplemental dissenting opinion under seal.

JOHN N. ROMANS, New York City (Michael J. Crofton, Lawrence S. Rosen, Joan E. Lambert, Katten Muchin & Zavis, New York City, of counsel), *for Appellant TWA.*

* Honorable Eugene H. Nickerson, United States District Judge for the Eastern District of New York, sitting by designation.

FREDRIC LEWIS, New York City, *for Appellee Estate of Alberto Ospina.*

NICHOLAS GILMAN, Washington, D.C. (Gilman, Olson & Pangia, Washington, D.C., of counsel), *for Appellee Mohsen Youssef.*

MESKILL, *Chief Judge*:

This case involves the precautions that airlines must take in order to receive the shelter from liability that the Warsaw Convention provides to carriers in all cases except those involving willful misconduct, *see* 49 U.S.C. app. § 1502 note. Trans World Airlines, Inc. (TWA) argues that insufficient evidence existed to support the jury's finding of willful misconduct. We agree with TWA and reverse the district court's denial of TWA's motions to set aside the verdicts.

BACKGROUND

As TWA Flight 840 approached Athens' airport on April 2, 1986, a bomb exploded, killing four passengers and injuring others. Although the bomb created a large hole in the fuselage, the airplane landed safely. The Judicial Panel on Multidistrict Litigation consolidated the ensuing suits, which were referred to the United States District Court for the Eastern District of New York, Weinstein, *J.* All of the suits settled, with the exception of the two now before this Court on appeal. Plaintiff Youssef, who was seated some distance from the explosion, suffered injuries. Plaintiff Ospina, who was seated near the

bomb, was blown out of the airplane and died. Both actions seek damages from TWA. After a bifurcated trial, judgments were entered in plaintiffs' favor.

The importance of the information in this case to the security and safety of commercial airlines and their passengers requires extraordinary treatment. Prior to the commencement of the liability phases of the proceeding below, the United States made a limited appearance in the action for the purpose of expressing its concerns about the disclosure, discussion and evaluation of airline security materials. So as not to jeopardize the safety of the traveling public, the district court ordered that the trial be closed to the public at such times as sensitive, anti-terrorist airline security information was to be disclosed, discussed or evaluated. Although the press had the right to review daily copy of the trial transcript, the United States received an initial opportunity to redact those portions of the transcript containing sensitive airline security information. At the conclusion of the trial, some exhibits were made available to the public while others—namely, those concerning sensitive information—were filed under seal.

The jury returned verdicts in plaintiffs' favor. The district court refused to set aside the verdicts or to grant a new trial. In rejecting TWA's motions, the district court did not reveal those facts on which liability rested. Instead, it stated that "[i]t is enough to say that the jury verdicts, finding TWA's delicts the equivalent of willful misconduct, were more than justified." Thereafter, prior to our hearing of this appeal, TWA moved this Court for an order requiring that appendices and briefs in these appeals be filed under seal. We granted the motion.

DISCUSSION

The parties agree that the Warsaw Convention, a multilateral treaty governing the international carriage of passengers, baggage and cargo by air, *see Chan* v. *Korean Air Lines*, 490 U.S. 122, 123-24 (1989), governs this case. The Convention's overriding purpose was "to limit air carriers' potential liability in the event of accidents." *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1270 (2d Cir.) (citations omitted), *cert. denied*, 112 S.Ct. 331 (1991). Toward this end, Article 17 of the Convention, as modified by the Montreal Agreement, limits carrier liability to $75,000 per claimant. *See* 928 F.2d at 1280. However, Article 25 of the Convention provides that a plaintiff may recover compensatory damages if he can show that the carrier engaged in willful misconduct.[1]

Plaintiffs' theory at trial was that TWA wrongfully neglected to perform certain acts that could have prevented the bombing. To be held culpable for willful misconduct in a case based on an omission, the defendant "must either have known that [the omitted act] was necessary for safety, or his duty to [perform the omitted act] must have been so obvious that in failing to [perform] it his conduct would be reckless, rather than negligent." *Pekelis* v. *Transcontinental & Western Air*, 187 F.2d 122, 125 (2d Cir.) (footnote omitted), *cert. denied*, 341 U.S. 951 (1951). Thus, plaintiffs needed to show that TWA omitted to do an act (1) with knowledge that the omission

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1 Article 25 (1) provides as follows:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

49 U.S.C. app. § 1502 note.

of that act probably would result in damage or injury, or (2) in a manner that implied a reckless disregard of the probable consequences. *See Republic Nat'l Bank of New York* v. *Eastern Airlines*, 815 F.2d 232, 238-39 (2d Cir. 1987). A lesser standard would undermine the purpose of the Convention and would contradict Article 25(1)'s plain language.

TWA argues that a reasonable jury could not have found "willful misconduct" in this case. In reviewing the verdict to determine if it could have been produced by a reasonable jury, we view the evidence in the light most favorable to the non-moving parties and give them the benefit of all inferences that the evidence supports. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

TWA stresses that it complied with Federal Aviation Administration (FAA) procedures and the laws of each country in which it operated. Plaintiffs counter by pointing to a threat that existed on Flight 840 and by emphasizing certain acts not performed by TWA that they claim TWA should have performed, which acts, plaintiffs claim, might have led to detection of the bomb that caused their injuries. In making this argument, plaintiffs emphasize that the FAA required airlines *thoroughly* to search the cabin and cockpit areas of airplanes to eliminate any hidden weapons, and that TWA failed to utilize two procedures which, although not specifically required by the FAA, would have uncovered the bomb that exploded on Flight 840.

As it did below, this case turns on whether plaintiffs introduced sufficient evidence to support the jury's verdict in plaintiffs' favor, a necessarily fact-specific inquiry. However, due to the unusual circumstances of this case,

a detailed explanation of the probity of the record evidence might, in the wrong hands, endanger the traveling public. Having reviewed the record, we do not believe that a reasonable jury could have concluded that TWA's acts and omissions constituted willful misconduct. TWA's failure to take certain measures in searching the cabin—which defendants stress and plaintiffs apparently concede no airline regularly employed at that time—did not provide evidence of willful misconduct. Moreover, none of TWA's other acts or omissions violated a specific FAA requirement, and each of TWA's acts complied with all positive FAA safety procedures and regulations as well as the laws of the countries in which TWA operated. Nor do we believe that a reasonable jury could have concluded, based on the record in this case, that a specific threat existed that was sufficient to raise to the level of willful misconduct TWA's failure to employ the security measures pointed out by plaintiffs. Of course, if TWA had searched the place where the bomb was hidden, the bomb would have been discovered. That would be true in any case involving a hidden bomb. However, the test for willful misconduct is not 20-20 hindsight.

CONCLUSION

The parties raise a number of other issues that do not affect our decision, and we need not reach them. The judgment of the district court is reversed.

NICKERSON, District Judge, dissenting:

In my opinion these cases present not just an issue of whether there was sufficient evidence to support the jury

verdict, but also an important question of law which has serious implications for the safety of passengers on United States international air carriers.

That question of law is whether such a carrier should receive shelter from liability under the Warsaw Convention if it deliberately and willfully abandons procedures for screening passengers that it had agreed with the United States government to follow, and indeed had considered essential and had followed for many years.

The District Judge concluded that "the jury verdicts, finding TWA's delicts the equivalent of willful misconduct, were more than justified," and that the terrorist "was allowed aboard in flagrant violation of many basic security measures."

Because of a concern that if hijackers learned of the security arrangements at the Cairo Airport and on the TWA aircraft they would be able to circumvent them, the District Court excluded the public and the press during those portions of the trial where the testimony related to "sensitive airline security information." Those portions remain sealed, and this opinion does not refer to them. I here discuss only that evidence which the District Court did not consider sensitive. In a supplemental dissenting opinion filed under seal I mention certain sealed matters pertinent to the issues.

TWA's willful misconduct did not consist merely of the neglect to use certain search procedures on the aircraft. Of the flagrant violations of security measures mentioned by the District Court, I will address here only one.

Although the terrorist was a "profile selectee" requiring careful screening, TWA allowed her aboard after deliberately deciding not to enforce a screening require-

ment agreed upon by the United States government and TWA. That requirement was for "redundant screening" by TWA itself, not by Egyptian personnel, of all passengers (not just profile selectees).

The testimony of Billie H. Vincent makes clear that there was such a requirement. Vincent was no ordinary citizen. He had spent almost thirty years in the Federal Aviation Administration (FAA) and since 1982 had been its director of the Office of Civil Aviation Security, retiring only a few months after April 2, 1986, the date of the incident at issue.

Under Egyptian law, only Egyptian authorities were permitted to search physically passengers at the Cairo Airport. But as Vincent testified, "as a result of the determination by TWA and the U.S. government" that the local "security was inadequate" at Cairo, there was put in effect some years before 1986 a requirement for United States air carriers to conduct redundant screening in Cairo of all passengers, not just profile selectees.

According to Vincent it was "clearly understood" between himself and the TWA officials that the redundant screening by TWA "had to continue." Although the requirement for such screening was not formalized as a regulation, TWA recognized it as essential and in fact continued it over the years.

Quite plainly the requirement was implemented and continued because TWA and the United States government regarded the inspection by Egyptian personnel as insufficiently trustworthy to assure the safety of the passengers and crew. By April 2, 1986, the requirement was still in effect, and in fact had assumed added significance due to increased terrorist activities in the Middle East and elsewhere.

But on the day of this incident TWA, acting through its agents, knowingly and deliberately decided to abandon that requirement. TWA did this even though it knew that the woman was no ordinary passenger but a "profile selectee" posing a special risk.

TWA took the profile selectee to the gate at which it was equipped to do its own "redundant screening." But the gate was closed. TWA did not ask the Egyptians to reopen it. Nor did TWA tell the profile selectee that she could not leave on the flight because TWA was unable to screen her in time. Instead, evidently in haste to add one more passenger to the manifest, the TWA agent went with her to a gate where TWA was unequipped to supplement the screening by Egyptians with its own, more reliable procedures. The Egyptians took her into a private booth for screening. No one testified as to exactly what was said or what happened in that booth, or as to the extent, if at all, that the Egyptians searched her or her handbag. She was then allowed by TWA to board the airplane.

Some things are clear. TWA never electronically screened her carry-on bag or its lining. TWA did not check her person or bag with metal detecting hand wands. All this could and presumably would have been done if TWA had adhered to its established procedure agreed upon with the United States government and had taken her through the required redundant TWA screening. In turn, that redundant screening could presumably have detected the components for the bomb.

TWA's abandonment of an established screening procedure was not the result of inadvertence or negligence. It was a deliberate action made with full knowledge of the probable consequences. In a word, it was willful.

The fact that the requirement was not in writing does not diminish the significance of its abandonment. A written requirement may be easier to prove, but once it is proven the failure to follow a *de facto* requirement or procedure can rise to the level of willful misconduct. *Cf. Republic Nat'l Bank of New York* v. *Eastern Airlines*, 815 F.2d 232, 239-40 (2d Cir. 1987) (no willful misconduct for failure to follow *de facto* procedures where evidence failed to prove that defendant adopted such procedures).

Redundant screening by TWA was not some unimportant matter instituted out of caprice or whim. Common sense suggests that it was implemented for some purpose. As evidenced by TWA's continuation of redundant screening over the years and by other information which remains under seal, it was not something that TWA regarded as trivial or cosmetic. TWA knew it had to rely on its own defenses.

There were reasons why the United States and TWA regarded the Egyptian security procedures as untrustworthy. I cannot describe in this unsealed opinion the evidence of those reasons. It is enough to say that the specifics now held secret fully justified that lack of trust.

No single person at TWA was aware of all of the circumstances of the boarding of the profile selectee. But the "willful misconduct" of TWA must be evaluated in light of the circumstances known to its employees, managers, and agents, collectively. At least one of those employees charged with responsibility for security made the decision to abandon the screening by TWA personnel and to leave the passengers at the mercy of Egyptian personnel known by TWA to be untrustworthy.

Although I cannot discuss the details in this unsealed opinion, the record shows that once TWA decided to

abandon the requirement for redundant screening, TWA had no adequate procedures in place to repair the breach. This fact simply emphasizes the importance of TWA's pre-boarding screening.

I do not agree that the Warsaw Convention shelters TWA from liability when it willfully acts to abandon a screening procedure implemented by agreement with the United States government, a procedure that TWA knew under the agreement it "had to continue" and that TWA itself deemed essential.

I would therefore affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

ALBERTO OSPINA,	:	
Petitioner-Appellant,	:	Docket Nos.
- against -	:	91-9245
TRANS WORLD AIRLINES, INC.,	:	
Respondent- Appellee,	:	United States Court of Appeals
FRIGITRONICS, INC.,	:	Filed December 2, 1992
Intervenor.	:	Second Circuit
MOHSEN YOUSSEF,	:	
Petitioner-Appellee,	:	91-9247
- against -	:	
TRANS WORLD AIRLINES, INC.,	:	
Respondent-Appellant.	:	

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed in Ospina v. TWA, 91-9245, by appellant Albert Ospina, and

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed in Youssef v. TWA, 91-9247 by appellee Mohsen Youssef,

Upon consideration by the panel that decided the appeals, it is

Ordered that said petitions for rehearing are DENIED.

It is hereby noted that the suggestion for rehearing in banc having been transmitted to the judges of the Court in regular active service and to any other judge that heard the appeal and a request for an in banc vote having been made by a judge of the panel, and a poll of the judges in regular active service having been taken, a majority of the Court has voted not to reconsider the decision in banc.

ELAINE B. GOLDSMITH, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re: INFLIGHT EXPLOSION ON TRANS WORLD AIRLINES, INC. AIRCRAFT APPROACHING ATHENS, GREECE ON APRIL 2, 1986

Amended Memorandum, Order, and Judgment

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THIS DOCUMENT PERTAINS TO:

OSPINA v. TWA
87 Civ. 1238 (JBW)

and

YOUSSEF v. TWA
87 Civ. 0060 (JBW)

MDL No. 727 (JBW)

Filed
In Clerk's Office
U.S. District
Court E.D.N.Y.
November 21,
1991

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WEINSTEIN, J.:

I. FACTS

As TWA Flight 840 was approaching Athens airport en route from Rome on April 2, 1986, a bomb exploded under one of the seats. Four passengers were killed and others were injured. Mohsen Youssef, seated some distance from the explosion, suffered physical and psychic injury. Alberto Ospina, seated over the bomb, was blown out of the plane; his broken body was later found with serious wounds in the lower torso. Despite a large hole in the fuselage, the plane landed safely.

A young female terrorist had boarded in Cairo and placed the bomb under her seat. She was allowed aboard in flagrant violation of many basic security measures. Compounding TWA's gross errors was a failure to search the cabin properly in Rome, the first stop after Cairo. The terrorist set the bomb trigger and left the plane in Rome, proceeding to a self-congratulatory T.V. appearance in Lebanon.

To detail TWA's neglect would reveal security measures and information best left unpublished. (When the security evidence was taken the courtroom was cleared.) It is enough to say that the jury verdicts, finding TWA's delicts the equivalent of willful misconduct, were more than justified. The award to Youssef is not seriously challenged. It was fully supported by the record.

The only open issue is the propriety of $2,754,951.60 in damages awarded to Mr. Ospina's widow. TWA particularly attacks an included award of $85,000 for Mr. Ospina's pain

and suffering as he was being blown out of the plane and was falling to the ground.

Mr. Ospina was thirty-nine years old, a successful Colombian-American who was travelling on business when the accident occurred. He flew all over the world, training physicians and technicians to use the medical devices his company produced. He was being groomed for the position of vice-president in charge of international marketing. The amount of loss attributable to death was fully supported by the evidence.

Describing the injuries, the Athens Medical Examiner at the post-mortem examination determined that the body had been nearly severed by the blast. There were bruises and abrasions on the skin and multiple fractures of the skull, sternum, ribs, and lower extremities. First and second degree burns covered more than 20% of Mr. Ospina's body. The lower body was largely eviscerated. After noting other injuries, the examiner concluded that "the dismemberment of the body was made while alive, while the dull injuries were made postmortally."

TWA made strenuous efforts to challenge the conclusions of plaintiff's expert, the well-qualified coroner of Westchester County. The expert insisted that Mr. Ospina probably lived five to ten seconds after the blast and that he was aware of what was happening to him. TWA produced no expert on this issue. Assuming, as we must, that Mr. Ospina knew what was happening as he was plunging to his death, an award of $85,000 is not excessive. There was enough evidence to support the jury's verdict that Mr. Ospina suffered pain and extreme psychic damage after he was injured by the bomb, but before he died.

TWA claims that damages for pain and suffering are improper under the Warsaw convention. For a variety of reasons described below, such damages are awardable under the Warsaw convention.

II. LAW UNDER THE WARSAW CONVENTION

The Warsaw Convention was ratified by the United States Senate in 1934. It governs air carrier liability for harm to passengers on international flights. The carrier is liable for "damages sustained in the event of the death or wounding of a passenger." Article 17 of the Warsaw Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, entered into force Oct. 29, 1934, reprinted at 49 U.S.C. App. §§ 1502 (1976). The original French text reads:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure, ou de toute autre lesion corporelle subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement.

49 Stat. 3005.

The Montreal Agreement of 1966 modified the Convention for flights with connecting points in the United States, raising the limit of liability to $75,000 and eliminating due care defenses. See Agreement Relating to Liability. Limitation of the Warsaw Convention and the Hague Protocol, approved by C.A.B. Order No. E-23680, reprinted at 49 U.S.C. App. § 1502 (1976). So modified, the Warsaw Convention now subjects international carriers to strict liability for Article 17 injuries sustained on flights connected with the United States.

Under Article 25 of the Convention, the $75,000 limit is inapplicable where the damage arises from an air carrier's" willful misconduct." That provision reads:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

49 U.S.C. App. § 1502 (1976). Article 25 applies in this case.

A. FEDERAL CAUSE OF ACTION

For much of its history, the Warsaw Convention was interpreted as not creating an independent cause of action. Rather, courts held that the Convention simply created legal principles to determine recovery for infringements of indepen-

dently created rights. Only in 1978 did the Court of Appeals for the Second Circuit rule that the Convention creates its own wrongful death cause of action founded in federal treaty law. Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979). Other circuits soon followed. See, e.g., In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 412 (9th Cir. 1983) [T]he Convention creates an independent cause of action for wrongful death, a cause of action founded in federal treaty law."); Boehringer Mannheim-Diagnostics, Inc. v. Pan Am. World Airways, 737 F.2d 456, 459 (5th Cir. 1984) (Warsaw Convention creates controlling cause of action and preempts state law), cert. denied, 469 U.S. 1186 (1985).

One troubling issue for courts in circuits which recognize a cause of action under the Convention is the status of state law claims. Should plaintiffs be permitted to sue under both the Convention and state statutes? The Second Circuit recently answered in the negative, holding that a Warsaw Convention wrongful death action preempts all state law causes of action:

> We therefore decline to read into the Convention any attempt to preserve a right to a state law cause of action in addition to the action provided under the Convention itself.

In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1274 (2d Cir. 1991). Explaining its reasoning, based largely on the need for uniformity, the court continued:

> The way the other parties (to the Convention) have viewed the Convention, its emphasis on uniformity, and the need for a single, unified rule on such

> points as the recoverability of punitive damages lead to the belief that the Convention should be interpreted as making all actions -- other than those not based on the Convention -- exclusive under it.

Though resolved in the Second Circuit, the question whether the Convention preempts state law causes of action is an open question elsewhere. Chief Judge Mikva has criticized the In re Lockerbie decision, finding it "astonishing" in light of earlier precedents. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1492 (D.C. Cir. 1991) (Mikva, C.J., dissenting in part); see also Calderon v. Aerovias Nacionales de Colombia, Avianca, Inc., 738 F. Supp. 485, 486 (S.D. Fla. 1990) ("[T]he Warsaw Convention, rather than supplying an exclusive cause of action, provides only an exclusive remedy for such actions, however founded.") (emphasis added); Morgan v. United Air Lines, 750 F. Supp. 1046, 1052 (D. Colo. 1990) (state law is not preempted under the Warsaw Convention).

The Supreme Court has twice declined to decide the issue of exclusivity under the Warsaw Convention. See Eastern Airlines v. Floyd, 111 S. Ct. 1489, 1502 (1991); Air France v. Saks, 470 U.S. 392, 409 (1985) (expressing no view on whether plaintiff's state negligence action could go forward if Convention's liability rules did not apply). In the Second Circuit, at least, any remedy must be predicated, not on state law, but on federal common law.

Should the Supreme Court ultimately decide that state law causes of action continue to be enforceable (contrary to the Second Circuit view), the conclusion of this memorandum would be unchanged. Were state substantive law to govern, the law of New York under applicable federal and state conflict

rules would apply, the parties have in effect conceded. New York substantive law allows recovery for pain and suffering prior to death.

B. FEDERAL COMMON LAW

Appellants in In re Lockerbie were appealing lower court orders which had denied punitive damages under the Warsaw Convention. One case concerned the hijacking of a Pan Am jet over Karachi, Pakistan, on September 6, 1986. The other case stemmed from the notorious bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988.

Having decided that the Convention preempts state wrongful death causes of action, the Second Circuit next considered what law applies in suits filed under the Convention itself. Since the Warsaw convention is a treaty, with the same stature and effect as a federal statute, the In re Lockerbie court held that federal law must be applied to construe the Convention. It wrote:

> We look to the source of the right in order to determine the controlling law. The source of the right to sue under the Convention is the Convention itself -- a treaty that only the federal government has the power to make. . . .
>
> Consequently, the source of the right is federal law -- in fact, uniquely federal law. It follows then the substantive law we must apply is also federal law.

In re Lockerbie, 928 F.2d at 1278 (citations omitted; emphasis in original). The court determined that the applicable substantive law is the law of tort, not contract.

Two other courts have applied federal common law to cases brought under the Warsaw Convention. In In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir. 1991), the D.C. Circuit engaged in an analysis similar to that of the In re Lockerbie court, applying federal common law to determine whether plaintiffs were entitled to punitive damages in a cause of action under the convention. See In re Korean Air Lines, 932 F.2d at 1484-90 (finding punitive damages not allowable under the Convention). Another earlier case, Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003-04 (9th Cir. 1987), applied federal common law to ascertain the proper choice of law under the Convention.

In determining the applicable federal common law on the issue of survival recovery for pain and suffering damages, it is desirable first to examine the development of the current United States judicial and legislative consensus.

III. WARSAW CONVENTION RECOVERY IN HISTORICAL CONTEXT

A. WRONGFUL DEATH

Wrongful death actions and survival actions are designed to compensate for different kinds of loss. A wrongful death award compensates the estate or the family members for the economic loss they suffer as a result of death, whereas a survival action continues the injured person's own claim for injuries which accrued before death. The common law did not

recognize either of these claims, and several principles have been offered in explanation. See generally F. Harper, F. James & O. Gray, The Law of Torts § 24.1 et seq. (2d ed. 1986).

Under the felony merger doctrine, a tort against another human being was considered less serious than a crime against the crown. The crown was the first to exact punishment, which usually meant that the felon was executed and his property forfeited. Id. § 24.1, at 455 n.1. Logically, wrongful death recovery was impossible: nothing of the defendant or his property remained, even if a victim's family had been able or had wanted to pursue a private cause of action. Moreover, at common law judges had an aversion to placing a value on something so sacred as human life. See Smedley, Wrongful Death--Bases of the Common Law Rules, 13 Vand. L. Rev. 605, 613 (1960).

The American colonies did not follow the common law rule. They required an assailant to pay a sum to the victim's family, concomitant to the criminal proceeding, not as a separate civil action. This departure from the British practice of denying wrongful death recovery stemmed at least in part from the peculiar needs of a colonial nation, the absence of persons learned in the law, and the colonists' dim understanding of certain of the doctrines brought over from England. See generally Malone, The Genesis of Wrongful Death, 17 Stan. L. Rev. 1043, 1063 (1965).

The ascendancy of industry and the railways may explain why wrongful death actions resurfaced in mid-nineteenth-century America:

> Tragedy as a result of indifference and neglect was suddenly upon us in the factory, on the city streets, and on the rails. Nor was the principal villain of the piece any longer the impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.

Malone, supra, at 1043. The notion of locomotives injuring the nineteenth-century worker raises an eerie comparison to the huge jets ferrying twentieth-century workers like Alberto Ospina around the globe.

The first British wrongful death statute was enacted in 1846. See Fatal Accidents Act (Lord Campbell's Act), 9 & 10 Vict., ch. 93 (1846). Many American states soon followed, and every state has now modified the common law rule by statute to provide for some kind of wrongful death recovery. F. Harper, F. James & O. Gray, supra, § 24.1.

B. SURVIVAL

Survival actions are distinct from wrongful death claims, and are designed to continue whatever action the decedent would have had, but for his death. A survival action ensures that a tortfeasor will not do better by killing rather than by simply injuring. Without a survival action, a defendant escapes liability for personal injury or pain and suffering at the moment the injured plaintiff dies.

Survival actions are designed to avoid another ancient common law rule: actio personalis moritur cum persona ("a personal action dies with the person"). See 2 S. Speiser,

Recovery for Wrongful Death § 14.1 (2d ed. 1975 & Supp. 1990); see also Livingston, Survival of Tort Actions: A Proposal for California Legislation, 37 Calif. L. Rev. 63 (1949). This rule is ancient; it was common among the English courts of the fifteenth century. Malone, supra, at 1044 n.1 (citing 3 W. Holdsworth, A History of English Law 576 (3d ed. 1923)). At one time, commentators thought the maxim originated in Roman jurisprudence, but this assumption has since been abandoned. See Malone, supra, at 1051 (citing H. Goudy, Two Ancient Brocards, in Essays in Legal History 18-22 (P. Vinogradoff ed. 1913)).

There are some explanations, though none particularly compelling, for why causes of action were thought to expire upon the death of plaintiff or defendant. As noted above, one reason is the lack of anything to award a plaintiff once the state had exacted its punishment. Moreover, when the plaintiff died, his need for vengeance and satisfaction from the defendant also seemed to expire. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on Torts § 126, at 942 (5th ed. 1984). With a conceptual shift away from punishment and toward compensation in the law, survival recovery followed. See id. In a sense, the value of the inchoate claim "earned" by the deceased during his or her lifetime could be passed on after death like other assets.

At first, only a limited group of persons could recover survival damages for injury to others. Masters recouped for losses to servants; husbands could recover for injuries to wife and child. Wives and servants, however, had no corresponding rights:

> [T]he inferior hath no kind of property in the company, care or assistance of the superior, as the

> superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.

3 W. Blackstone, Commentaries *143.

By the mid-nineteenth century, legislatures began to eliminate these and other common law rules. Smedley, supra, at 619. In 1934, a British statute was enacted to provide that the right to maintain a suit did not expire with the death of the injured person. See Law Reform (Miscellaneous Provisions) Act, 24 & 25 Geo. 5, ch. 41 (1934). The majority of states now permit some kind of survival action. See 2 S. Speiser, Recovery for Wrongful Death § 14.8 (2d ed. 1975 & Supp. 1990). See generally Miller, Dead People in Torts: A Second Installment, 22 Cath. U.L. Rev. 73 (1972). In those states permitting survival recovery, all courts permit damages for conscious pain and suffering in personal injury cases. F. Harper, F. James & O. Gray, supra, §§ 25.10, 25.16; see also Restatement (Second) of Torts §§ 904, 905 (1979).

This development is consistent with the current economic rationales and conceptual underpinnings of modern American tort law: first, full compensation for the persons harmed; second, deterrence against future delicts by the wrongdoer; and third, some recognition of each person's inviolate right against impairment of his or her freedom. See generally 1 A.L.I. Reporter's Study Enterprise Responsibility for Personal Injury 14-33 (1991); Tort Law and the Public Interest 18-39 (P. Schuck ed. 1991); S. Perry, The Moral Foundations of Tort Law (1991) (collecting non-economic theories of tort law); O. Holmes, The Common Law 94-102 (1881, 1943 ed.).

Courts generally rely on the economic policy underlying the first two of these principles, but the third is a powerful

hidden premise influencing both courts and juries. These principles have led to the widespread acceptance of full compensation for loss as one of tort law's hallmarks. See infra Section V(A). The $75,000 Warsaw Convention limit is a statutory departure that yields to these general principles when an air carrier causes damage through willful misconduct.

IV. EVOLUTION OF CURRENT CONSENSUS

A. STATE LAW

Survival recovery for pain and suffering is an issue on which there is a clear consensus in American state law. The overwhelming majority of states have survival statutes or provide for survival recovery under wrongful death statutes. See generally 2 S. Speiser, supra, § 14.8; Restatement (Second) of Torts §§ 925, 926 (1979).

Applying these survival statutes, scores of state law decisions uphold conscious pain and suffering awards in air crashes and other traumatic situations. See, e.g., In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 760 F.Supp. 1283, 1287 (N.D. Ill. 1991) (damages for pre-death pain and suffering recoverable under California wrongful death statute); cf. 1 N.Y. Pattern Jury Instructions 2:171 (2d ed. 1974 & Supp. 1990) (Warsaw Convention); 2:280 (pain and suffering). Many courts require affirmative proof that the plaintiff was conscious and aware of the injury. See, e.g., In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 507 F. Supp. 21, 24 & n.1 (N.D. Ill. 1980) (declining to strike or dismiss pain and suffering claims under Illinois law and permitting discovery on issue of whether victim was conscious even for a short time); Caldarera v. Eastern Airlines, 529 F.

Supp. 634, 640 (W.D- La. 1982) (damages improper under Louisiana law where there was no proof of decedent's conscious suffering).

The cases denying such pain and suffering awards are the exception. See, e.g., El-Meswari v. Washington Gas Light Co., 785 F.2d 483, 490-91 (4th Cir. 1986) (Virginia statute does not allow pre-death pain and suffering damages where roofing materials were thrown from roof onto five-year-old child); O'Keeffe v. Boei Co., 335 F. Supp. 1104, 1115 n.34 (S.D.N.Y. 1971) (Washington state survival statute did not allow conscious pain and suffering where decedents were killed in plane crash).

The In re Lockerbie decision made clear that a cause of action under the Warsaw convention preempts all state law wrongful death claims. But decisions rendered under state law, as well as a well-developed American consensus of providing survival actions after death, need not be cast aside. Like the federal statutes and decisions examined below, current state law decisions are instructive in fashioning a uniform modern federal common law rule for Warsaw Convention recoveries.

If possible, federal common law tort jurisprudence should be consistent with that developed by the states. Cf. Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1490 (D. Colo. 1985) (turning first to state law in developing federal common law of contribution under section 107 of Comprehensive Environmental Response, Compensation, and Liability Act). The federal courts need not ignore the wisdom acquired in modern times. They need not reinvent a new wheel -- particularly where the wheel may have been adequate only for a common-law era ox and cart. On the issues now before the court, a consensus in United States tort law is possible. Cf. In re "Agent Orange"

Prod. Liability Litigation, 580 F.Supp. 690, 693-703, 706 (E.D.N.Y. 1984) (national consensus law applied to determine liability and appropriateness of punitive damages).

B. FEDERAL STATUTORY ANALOGUES

Although the In re Lockerbie court directed that federal law must be applied to interpret the Warsaw Convention, it did not point courts in any particular direction to find that law. The Ninth Circuit has suggested that courts should look to federal statutory analogues, writing that

> the questions of who are the persons entitled to assert th(e Warsaw convention wrongful death] cause of action and what are their respective rights may be determined by reference to other federal statutes . . . .(W]e leave to future courts the task of determining the most appropriate analog.

In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 415 (9th Cir. 1983) (citation omitted).

In deciding which federal statutes to examine, the Supreme Court has offered some guidance. In Moragne v. States Marine Lines, 398 U.S. 375 (1970), the Court suggested several possible statutes that might be helpful in determining the proper beneficiaries in a general maritime (common law) wrongful death action. Although the Court declined to choose any one of the statutes in that case, it suggested as possibilities the Federal Employers' Liability Act, the Jones Act, the Outer Continental Shelf Lands Act, the Longshore and Harbor Workers' Compensation Act, and the Death on the High Seas Act. Moragne, 398 U.S. at 407-09. A number of these

statutes, among others, are considered below. Under each of these statutes, survival recovery is allowed and pain and suffering damages are appropriate.

1. FEDERAL EMPLOYERS' LIABILITY ACT

The Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., (1986) ("FELA"), governs liability of common carriers to their employees for injuries arising in the course of employment. One section explicitly provides for a survival action for the benefit of the employee's beneficiaries:

> Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative.

Id. § 59.

Under the FELA, courts have awarded pain and suffering damages for the period of time between injury and death. In one case, the court held that the administrator of a railway switchman's estate could recover for the 3 1/2 hours of conscious pain and suffering that he experienced before his death. Wetherbee v. Elgin, Joliet & E. Ry. Co., 191 F.2d 302, 308 (7th Cir. 1951). Although the FELA applies by its terms only to federal employees, the statute is useful as an analogue since it specifically provides that a survival action includes damages for "[a]ny right of action" the deceased would have been able to maintain if he or she had survived. See 45 U.S.C. § 59 (1986) (emphasis added).

2. FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976); 28 U.S.C. § 2671 et seq. (1965) ["FTCA"), governs tort claims against the United States government. As with the FELA, courts have awarded post-injury pain and suffering damages for claims filed under the FTCA. Although the FTCA itself has no survival provision, state statutes which permit pain and suffering damages are relied upon to grant survival damages to FTCA plaintiffs.

A striking series of cases under the FTCA arose where persons suffered Guillain-Barre Syndrome after being administered the Swine Flu Vaccine. In Cardillo v. United States, 622 F. Supp. 1331 (D. Conn. 1984), the court approved the pain and suffering award for the period of time beginning when the plaintiff was attached to a respirator until it was discovered disconnected ten days later. The court also found that beyond that date until plaintiff's death, she had sufficient cognition to perceive pain and thus a further award was proper. Id. at 1347; see also Hewitt v. United States, 550 F. Supp. 589, 591 (D. Mass. 1982) (recovery appropriate under Massachusetts law for conscious pain and suffering of decedent administered swine flu vaccine); cf. Smiel v. United States, 147 F. Supp. 835, 835-36 (N.D.N.Y. 1957) (denying conscious pain and suffering damages under FTCA for three-year-old child who died within minutes of being run over by mail truck, because there was no showing of negligence; implying that recovery would have been permitted on such showing).

The FTCA has a broader sweep than the FELA, since it covers all possible plaintiffs rather than employees alone. In addition, since the claims are tort-based, the analogy to causes of action under the Warsaw Convention is bolstered. As already noted,

the Second Circuit in In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1279 (2d Cir. 1991), determined that the federal common law claims under the Warsaw Convention sound in tort.

3. LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (1986) ("LHWCA"), addresses compensation for employees injured on or near navigable waters of the United States. Section 903 provides:

> [C]ompensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including [adjoining structures]) . . . .

Id. § 903(a). The LHWCA excludes federal employees from coverage. Id. § 903(b).

Under the LHWCA, courts have awarded pain and suffering survival damages, even where the time period between injury and death was brief. For example, in Hinson v. SS Paros, 461 F. Supp. 219 (S.D. Tex. 1978), the court approved a $5,000 award for the "fleetest seconds" between the time a longshoreman fell overboard and then drowned. Id. at 222. Another court sustained an even higher award for the excruciating pain suffered by a sulphur company employee when molten sulphur fell on him and killed him as he was unloading a barge. Drachenberg v. Canal Barge Co., 621 F.2d

760, 762 (5th Cir. 1980) (district court's award of $40,000 was appropriate; even higher award might have been proper).

4. JONES ACT

Where a seaman is injured on board a vessel, the Jones Act provides a cause of action against ship owners for their negligence. The statute provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . ; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . . .

46 U.S.C. App. § 688(a) (Supp. 1991). Although the Jones Act itself has no survival provision, it affords the same remedies as the FELA. See id. ("all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply"); Cox v. Dravo Corp., 517 F.2d 620, 622 n.2 (3d Cir.) (en banc), cert. denied, 423 U.S. 1020 (1975) ("[T]he judicial principles developed under the FELA are also applicable to the Jones Act.").

A number of cases decided under the Jones Act have awarded pain and suffering damages for the interval between injury and death, even where the time period was short. For example, the Ninth Circuit in Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746, 752 (9th Cir. 1980), approved the damage award of $35,000 for a deckhand's 2 1/2 minutes of

conscious pain and suffering before he drowned after falling off a tugboat into the Columbia River. As in the case before the court today, the pathologist estimated the period of consciousness based on an autopsy. See id. at 748. The Ninth Circuit declined to adopt a "stop watch approach" to determine whether the decedent had been conscious for a legally cognizable interval of time; rather, the court held that the inquiry should depend on the circumstances of each case. Id. at 751.

Similarly, the court in In re Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15, 28 (S.D.N.Y. 1965) (Weinfeld, J.), modified, 364 F.2d 118 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967), let stand a damage award of $1,500 for the decedents' two to three minutes of conscious pain and suffering when their tugboat went down. The court wrote that "while their suffering was short-lived, it was intensive, excruciating and agonizing." Id. As one court wrote, "[t]he fact that death came in a matter of minutes, or even less, does not necessarily preclude an award for conscious pain and suffering." Noel v. Linea Aeropostal Venezolana, 260 F. Supp. 1002, 1006 (S.D.N.Y. 1966) (plane en route to Venezuela exploded and crashed off the New Jersey coast).

5. CIVIL RIGHTS ACT

The Civil Rights Act, 42 U.S.C. § 1983 (1981), provides a cause of action where civil rights are violated by those who act under color of state authority. Courts have awarded conscious pain and suffering survival damages under this statute. For example, in Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990), the Tenth Circuit held that the wife of an inmate who was killed by other inmates could recover for pre-death pain and suffering in her civil rights action. The

court found that the damages recoverable under the Oklahoma survival statute were too restrictive, and thus a federal survival remedy was appropriate to vindicate the purpose of section 1983. Id. at 1506-07.

In another case, a mother was permitted to recover for the pain and suffering of her minor son who was killed by police officers. Guyton v. Phillips, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981) ("To deny recovery for pain and suffering would strike at the very heart of a § 1983 action."); see also Sharpe v. City of Lewisburg, 677 F. Supp. 1362, 1365 (M.D. Tenn. 1988) ($25,000 allowed for pain and suffering of man who lived no more than a few minutes after being shot by police officers). The district court in Guyton held that conflicting provisions of the California wrongful death statutes were preempted, just as In re Lockerbie determined that state statutes are preempted by the Warsaw Convention wrongful death action. See 532 F. Supp. at 1166; see also McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir. 1983) (application of state survival statute not allowed if it would bar or limit section 1983 remedies in a death action).

In addition to a section 1983 action, another section of the Civil Rights Act explicitly provides for a survival action. The widow or next of kin of one who dies from a conspiracy has a cause of action against anyone who had both knowledge of the prohibited conspiracy and power to prevent the harm. See 42 U.S.C. § 1986 (1981).

Finally, there is a separate federal constitutional civil rights action that would support both a death and a survival action. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971) (petitioner had cause of action for damages for any injuries suffered as a result of fourth amendment viola-

tion); id. at 396 ("'it is . . . well-settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done"') (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

The Supreme Court has held that survival recovery is allowable in a Bivens action, and the survival claim is governed by federal common law. See Carlson v. Rereen, 446 U.S. 14, 24-25 (1980). The Court nonetheless declined to decide the content of the applicable federal common law. See id.; see also Weeks v. Benton, 649 F. Supp. 1297, 1309 (S.D. Ala. 1986) (applying Carlson by analogy to hold that Alabama wrongful death statute may only be applied to the extent that it permits survival of section 1983 action).

6. DEATH ON THE HIGH SEAS ACT AND GENERAL MARITIME LAW

Defendant TWA urges that the Death on the High Seas Act, 46 U.S.C. § 761 et seq. (1975) ["DOHSA"] provides the most apt analogy under the Warsaw Convention. The DOHSA governs liability for any tortiously caused death occurring more than one marine league from shore. In Moragne v. States Marine Lines, 398 U.S. 375 (1970), the Supreme Court noted that among the possibly analogous federal statutes, the Death on the High Seas Act is more general, applying

> not just to a class of workers but to any "person," . . . bas[ing] liability on conduct violative of general maritime law . . . .

Id. at 408.

By its own terms, the DOHSA does not provide for survival recovery. See id. § 761 ("the personal representative of the decedent may maintain a suit for damages. . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative"); Miles v. Apex Marine Corp., 111 S. Ct. 317, 327 (1990) ("At the federal level, DOHSA contains no survival provision."). Nonetheless, courts applying the statute have used both state survival statutes and general maritime law to permit survival recovery.

In some DOHSA cases, plaintiffs are permitted to recover for the period of conscious pain and suffering between injury and death through state survival statutes. See, e.g., Snyder v. Whittaker, 839 F.2d 1085, 1092 (5th Cir. 1988) (plaintiff whose husband drowned could recover pain and suffering damages under Texas survival statute in action under DOHSA); Camillas v. Joseph H. Carter, Inc., 280 F. Supp. 48, 51 (S.D.N.Y. 1968) ("The silence of the Death on the High Seas Act on this subject does not cut off a claim for ante mortem pain and suffering."). The Supreme Court has declined to approve or disapprove the practice of supplementing the DOHSA in this way. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 215 n.1 (1986) (declining to address whether DOHSA may be "supplemented" by pain and suffering recovery under some applicable state statute).

After the In re Lockerbie decision, the courts of this circuit may not be able to use state survival statutes to supplement a Warsaw Convention cause of action in the way the courts have done under the DOHSA. Other courts, however, have supplemented the DOHSA with a survival right based on general maritime law. See, e.g. Favaloro v. SIS Golden Gate, 687 F. Supp. 475, 480 (N.D. Cal. 1987) (although DOHSA preempts wrongful death actions under state and general

maritime law, it does not preempt general maritime survival action for pain and suffering). A common law survival right is engrafted onto the DOHSA in the same way that it would become part of the federal common law under the Warsaw convention.

Under the general maritime right of survival, a pre-death conscious pain and suffering award is appropriate. See, e.g., Law v. Sea Drilling Corp., 510 F.2d 242, 249-50 (5th Cir. 1975) (general maritime law permits recovery for conscious pain and suffering of employee killed when ramp on an oil rig collapsed in the Gulf of Mexico); Greene v. Vantage Steamship Corp., 466 F.2d 159, 166 & n.9 (4th Cir.1972) (pain and suffering appropriate in wrongful death action under general maritime law, since "[c]learly, there is no federal policy against [it]"). The Supreme Court recently declined to decide whether there is a general maritime right of survival. Miles v. Apex Marine Corp., 111 S. Ct. 317, 327 (1990). The Court wrote:

> Miles argues that we should follow the Courts of Appeals and recognize a general maritime survival right. Apex urges us to reaffirm the traditional maritime rule and overrule these decisions. We decline to address the issue, because its resolution is unnecessary to our decision on the narrow question presented.

Even if the Supreme court found that there is no maritime survival right, such a ruling would not necessarily bar survival rights under the Warsaw Convention because, as already noted, the general tort consensus in non-admiralty cases is to recognize a survival cause of action.

Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 264-65 (1972), cited by the parties, is inapposite. In Executive Jet, the Supreme Court examined the tests for admiralty tort jurisdiction, holding that an aviation tort must bear a significant relationship to traditional maritime activity and not simply occur over navigable waters. Id. at 269. An aircraft had hit a flock of sea gulls shortly after takeoff from Cleveland en route to Maine and New York and then crashed into Lake Erie. Since the intended course was almost entirely over land and there was no significant relationship to traditional maritime activity, there could be no admiralty jurisdiction in the absence of an applicable federal statute. See id. at 273-75. Executive Jet is a decision delineating jurisdictional, not substantive, law. Federal jurisdiction in the instant case is based on the Warsaw Convention and not on the DOHSA or on admiralty jurisdiction, and thus Executive Jet is irrelevant to the issue of whether a cause of action for pain and suffering survives death.

It is important to note that the process of fashioning federal common law under the Warsaw Convention does not actually involve applying the DOHSA. Thus, the DOHSA cannot be used to inhibit federal courts from recognizing a survival action under federal Warsaw Convention treaty common law or general maritime law. Some kind of recovery for conscious pain and suffering is permissible under each of the federal statutes examined which provides for wrongful death claims, and in the majority of states. Given this overwhelming evidence, it is unnecessary to choose from among the federal statutes for one analogue. Properly construed, all lead to allowance for pain and suffering after injury but before death.

V. POLICIES SERVED BY SURVIVAL RECOVERY FOR MENTAL AND PHYSICAL INJURY

A. FULL COMPENSATION

There is a rich history in American law of compensating those injured for the full harm suffered, whether physical injury alone or in combination with mental anguish. See Restatement (Second) of Torts § 901(a) (1979). The court in In re Lockerbie addressed the question of whether punitive damages were sufficiently compensatory in nature to be proper under the Warsaw Convention. After analyzing the history and purpose of the Convention, the Second Circuit concluded that any damages awarded under the Convention must be compensatory rather than punitive, and thus punitive damages are not allowed.

Permitting Mr. Ospina's damage award for conscious pain and suffering is consistent with the holding of In re Lockerbie. Pain and suffering damages are not punitive but compensatory. See Restatement (Second) of Torts § 912 comment b (1979). That is, the plaintiff who receives damages for pain and suffering gains redress for the actual harm caused. Mr. Ospina's damage award is proper under Second Circuit precedent. As the In re Lockerbie court wrote:

> [W]e agree that the way in which the Convention uses the term [dommage survenu] indicates that Article 17 refers to actual harm caused by an accident rather than generalized legal damages....
>
> The context within which the Convention was written adds further support to the conclusion that

> the damages contemplated by Article 17 are purely compensatory.

In re Lockerbie, 928 F.2d at 128:L.

Other courts have also concluded that "dommage survenu" refers to actual harm, which includes pain and suffering. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1485 (D.C. Cir. 1991) ("[t]he words 'damage sustained' do not refer to legal damages; they refer to actual harm experienced"); Floyd v. Eastern Airlines, 872 F.2d 1462, 1487 n.42 (11th Cir. 1989) ("While mental injuries are intangible in nature, allowing recovery for them is intended to be compensatory, and is in no way meant to penalize the wrongdoer.") (citation omitted), rev'd on other grounds, 111 S. Ct. 1489 (1991); In re Air Crash Disaster at Gander, Newfoundland, on December 12, 1985, 684 F. Supp. 927, 931 (W.D. Ky- 1987) ("Punitive damages are not 'damages sustained' by a particular plaintiff.").

B. HARMONIZING EASTERN AIRLINES v. FLOYD

Although "dommage survenu" encompasses many forms of harm, it cannot include purely mental injury unconnected to physical harm, following the Supreme Court's decision in Eastern Airlines v. Floyd, 111 S. Ct. 1489 (1991). Plaintiffs in Floyd were passengers on a plane which lost power in three engines and began a rapid descent toward the Atlantic Ocean. After futile attempts to restart the engines, the crew notified the passengers that the plane would be ditched. Moments later, the crew restored power and the plane landed at Miami International Airport without further incident. Plaintiffs sued the airline

for the extreme mental anguish they suffered in their brush with disaster.

After surveying the legal meaning of the phrase "dommage survenu" in Article 17, the structure and purposes of the Convention, the negotiating history surrounding its adoption, and the post-signing conduct of the signatories, the Court concluded that psychic injury alone will not sustain a damage award:

> [A]n air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of the injury.

Eastern Airlines v. Floyd, 111 S. Ct. at 1502.

Since the plaintiffs in Eastern Airlines v. Floyd had not suffered or alleged any physical injury, the Court declined to decide whether "dommage survenu" covers psychic injury in combination with physical damage. The Court wrote:

> [W]e express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.

Id. Nevertheless, the implication of Floyd is that psychic damage accompanying physical injury is recoverable.

The Supreme Court's opinion in Floyd contrasted purely mental injury with mental injury that is accompanied by physical harm. For example, in the section examining French case law, the Court wrote:

> [W]e have been directed to no French case prior to 1929 that allowed recovery . . . for the type of mental injury claimed here -- injury caused by fright or shock -- absent an incident in which someone sustained physical injury.

Eastern Airlines v. Floyd, 111 S. Ct. 1489, 1496 (1991) (emphasis in original). All the evidence suggested, the Supreme Court concluded, that the French legal meaning of the phrase "dommage survenu" could not apply to mental injury alone, but that it would apply to mental injury connected with physical harm. Both the documents the Court examined -- which need not be reconsidered here -- and the rhetorical force of the opinion, as well as the plain language of the treaty, point to recovery for those who suffer both physical and mental injury in combination. See generally Halberstam, The Use of Legislative History in Treaty Interpretation Dual Treaty Approach, 12 Cardozo L. Rev. 1645 (1991).

American cases prior to 1929 -- the year of the Warsaw Convention -- allowed psychic damage and pain and suffering when it was accompanied by physical trauma. See, e.g., St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 654 (1915) (appropriate for jury to award conscious pain and suffering damages where the decedent was "'groaning every once in a while'" during the half-hour he was pinned under a rail car before he died); Luckenbach S.S. Co. v. Campbell, 8 F.2d 223, 224 (9th Cir. 1925) (where a seaman on his way to clean the decks fell through a hatch and later died, $5,000 award was not too high for survival damages including conscious pain and suffering). But see Chicago, Milwaukee, & St. Paul Ry. Co. v. Clement, 226 F. 426, 426 (9th Cir. 1915) (where horse-drawn milk wagon full of coke and coal was hit by train at crossing and plaintiff driver's mangled body

was later found under the train, there was insufficient evidence to award pain and suffering since death was probably instantaneous).

1. FLOYD DISTINGUISHED ON THE FACTS

The factual setting in Eastern Airlines v. Floyd differs markedly from the case before the court today. That dissimilarity also supports affirming the jury award of damages to Mr. Ospina to compensate for conscious pain and suffering after wounding but before death. The experience of the Floyd plaintiffs, while no doubt excruciating, is of a different order from that experienced by the plaintiff here. The passengers on the Eastern Airlines flight were justifiably terrified as the plane lost altitude over the Atlantic but no one was physically harmed or lost his life. The passengers' mental suffering is different from the agony Mr. Ospina suffered while in pain from his wounds, falling to certain death after the bomb tore through his body and he was ejected from the aircraft.

Even if one of the plaintiffs in Eastern Airlines v. Floyd had suffered a heart attack or an injury to the eardrums from the sudden loss of altitude, the facts would not have supported recovery as forcefully as they do for Ospina. For the hypothetical Floyd plaintiff, the airline's willful misconduct would have caused first, mental anguish and then, physical harm: the "damage sustained" was fright, with a physical injury occurring thereafter partly as a result of the fright.

For Mr. Ospina, however, TWA's willful misconduct led first to his physical injury, which itself caused the pain and suffering, and then he died. The pain and suffering was a direct result of the physical injury. The injury, pain and

suffering, and death of Ospina were "damage sustained" under the treaty. Such a sensible interpretation of the language of Article 17 is not contrary to any ruling case law.

Plain meaning suggests that this must be "damage sustained in the event of the death or wounding of a passenger" under Article 17. Accord Burnett v. Trans World Airlines, 368 F. Supp. 1152, 11513 (D.N.M. 1973) (plaintiffs injured when their TWA jet was hijacked to Amman, Jordan could recover for "any . . . emotional anxiety that they can demonstrate resulted from a bodily injury suffered as a consequence of the hijacking"); see also Halberstam, The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach, 12 Cardozo L. Rev. 1645 (1991).

The Court's decision in Floyd is consistent with American tort law, since courts resist awarding damages for purely psychic injuries. See Restatement (Second) of Torts § 436A; J. Stein, Damages and Recovery § 8, at 11 (1972 & Supp. 1990). Courts have been reluctant to award damages for purely psychic injury for a variety of reasons. To begin with, compensating a plaintiff for mental injury in effect requires recognizing a right to emotional tranquility, which is as yet an ill-defined notion. In addition, many courts deny liability because psychic injuries are not considered real or substantial, or because of difficulties of proof. Proximate cause is a difficult aspect of proof where there is only psychic harm. See F. Harper, F. James & O. Gray, supra, § 18.4. Finally, with the prospect of awards for psychic injury alone, courts fear a flood of false claims.

There is in effect a three-level hierarchy for cases raising the issue of psychic harm. At the bottom, most troubling to courts, is purely psychic harm. In the middle, recognized by

only some statutes and courts, is mental anguish which immediately precedes physical injury or death. See generally Smith, Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193, 207 (1944). Finally, most provable and almost uniformly compensated, is psychic harm which directly results from or occurs with physical injury. See F. Harper, F. James & O. Gray, supra, § 18.4 (law freely allows recovery for psychic injuries resulting from physical harm, denominated "parasitic" psychic injury). Since Mr. Ospina suffered physical injury which then caused him psychic harm, the award of damages to compensate for that harm is appropriate.

2. "TRIPWIRE" ARGUMENT

An objection to permitting recovery for pain and suffering subsequent to physical injury is that it would provide a dangerous precedent. It is urged that any physical injury, however slight, would then act as a "tripwire" to permit recovery for plaintiffs with predominantly mental injuries. A slight scratch or bruise on one plaintiff would mean a bonanza for him or her, whereas a plaintiff with identical mental trauma but no physical damages would not be compensated. Whether or not a de minimis rule should be devised, it cannot apply here. Mr. Ospina was almost blown in two by the bomb blast. The evidence is uncontested that he suffered excruciating physical and mental agony before dying.

Equally distinguishable are those cases where the passenger is first terrorized as the plane plunges towards the ground and then suffers physical injury or death. Cf. Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (seeing no "intrinsic or logical barrier" to lower court's award

of damages for pre-impact psychic injury under New York law); Haley v. Pan Am. World Airways, 746 F.2d 311, 317-18 (5th Cir. 1984) (where plaintiff "apprehended his death at least from the time the plane's wing hit the tree," award of damages of $15,000 for four to six seconds of fear appropriate under Louisiana law). An argument might possibly be fashioned to exclude such prior psychic damages, but it would have no bearing where, as here, the wounding occurred first and was then followed by pain and terror.

Nor need it now be determined what the effect would be of a death simultaneous with wounding due to a crash or explosion. Cf. Moorhead v. Mitsubishi Aircraft Int'l, 828 F.2d 278, 288 n.43 (5th Cir. 1987) (denial of damages for pre-crash pain and suffering proper where pilot and passengers killed instantly and pre-crash suffering not proved); Galloway v. Korzekwa, 346 F. Supp. 1086, 1093-94 (N.D. Miss. 1972) (no damages under Mississippi law where death in automobile accident was instantaneous). But see United States v. Furumizo, 381 F.2d 965, 970 (9th Cir. 1967) (trial court's $15,000 pain and suffering award was not excessive even where death in small plane crash was almost instantaneous; question was one for trial judge).

The expert witness testified that Mr. Ospina was definitely alive and suffering after the explosion. The expert found that Mr. Ospina "would have experienced some type of conscious suffering in a period of a range of five to ten seconds and then death would have ensued." The jury awarded damages for the approximate time of consciousness.

C. PURPOSES OF THE CONVENTION

This case represents the beginning of the development of federal common law pursuant to In re Lockerbie. In that development, it is desirable -- to the extent that policy and treaty language permit -- to conform the federal common law to modern state common law. Consistency between federal and state common law is highly desirable. The two can develop side by side as changing conditions require.

As we have seen, survival damages are commonly awarded under a variety of federal statutes and under state law. If courts were not permitted to award pain and suffering survival damages under the Warsaw Convention, the Convention would be the exception to the American rule. The Second Circuit has indicated that uniformity is one of the purposes of the Warsaw Convention itself. The court in In re Lockerbie stressed that state law causes of action must be preempted in order to avoid inconsistent outcomes. See In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1274 (2d Cir. 1991). Uniformity within and among the states and federal government is desirable and is consistent with the national uniformity required by In re Lockerbie. Here, there is no inconsistency.

Uniformity among the nations signatory to the treaty has not been shown to be necessary or even possible. In fact, the reference in Article 25 of the Warsaw Convention to the "law of the court to which the case is submitted" suggests that national differences are expected. In any event, there would be approximate uniformity at least among common law nations, where the result in the instant case would be the expected norm. See, e.g., F. Harper, F. James & O. Gray, supra, § 24.2; Restatement (Second) of Torts § 925 comment k (1979).

The result in this case is also apparently not inconsistent with civil law. See generally Martindale Hubbell Law Digest, Canadian & International Law Digest passim (1991); B. Markesinis, A Comparative Introduction to the German Law of Torts 682, 685 (2d ed. 1990).

Cie Air France v. Teichner, 39 Revue Frangaise de Droit Adrien 232, 23 Eur. Tr. L. 87 (Israel 1984) (English translation on file in docket of instant case), strongly suggests that other common law nations would support recovery for psychic damages following severe physical injuries. In that case an Air France flight en route from Ben-Gurion Airport in Israel to Paris, France was hijacked with its passengers and taken to Entebbe Airport in Uganda. Before their rescue by the Israeli Air Force, the passengers were threatened and subjected to great stress but were physically unharmed. The passengers sued Air France.

The Israeli Supreme Court construed "dommage survenu" (damage sustained) and "lesion corporelle" (bodily injury) to include psychic damage and mental stress unaccompanied by physical harm, in the circumstances of the hijacking and subsequent events in Uganda. The Israeli high court relied upon French general tort law principles that all the elements of damage require full compensation. It also pointed out that while English and American courts were loath to allow damages for psychological prejudice at the time of enactment of the Warsaw Convention, there had been considerable softening of that view subsequent to adoption of the treaty. The court concluded that under Israeli as well as general civil and common law analyses, purely psychic injuries warranted compensation under the Warsaw Convention. For purposes of tort law, Israel may be considered a common law country since its law is still largely influenced by that of Great Britain.

Subsequently, in Eastern Airlines v. Floyd, 111 S. Ct. 1489 (1991), the United States Supreme Court rejected the Israeli view for this country and denied damages for purely psychic injuries. It reviewed but did not adopt Teichner. See Floyd, 111 S. Ct. at 1498, 1501. The discussion in Teichner is, however, still relevant to the issue now before this court -- psychic damages associated with severe physical injury. Teichner strongly suggests that the rule adopted in the instant case would a fortiori be the one embraced by both common law and civil courts. Thus, uniformity among the nations bound by the Warsaw Convention would be enhanced were the United States federal common law to incorporate the rule that psychic damage associated with physical injury is compensable under the Warsaw Convention.

Uniformity is only one of the purposes of the Warsaw Convention. In addition, the treaty was intended to "limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry." Eastern Airlines v. Floyd, 111 S. Ct. 1489, 1499 (1991) (citations omitted). At first glance, today's decision may seem inconsistent with that goal. The airline industry is not still "fledgling," however, as it was in the 1920s and 1930s when the Warsaw Convention was negotiated and signed. Air travel is a strong mass industry like so many others in the late twentieth century, no weaker than the bus, truck, or maritime industries which are all subject to survival actions.

Allowing survival recovery does not expand liability for international air disasters: it simply clarifies the character of damages that are already recoverable under the Convention. Thus survival recovery is not inconsistent with the purposes of the Convention. If there is any risk of slightly enhanced liability, it is overborne by the changing nature and circum-

stances of modern international air travel. See In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1310 (9th Cir. 1982) (acknowledging plaintiffs' arguments that the airline industry is no longer in its infancy and thus policies must shift). But see id. at 1309 (court interpreting a treaty like the Warsaw convention must "studiously avoid imposing its own view of foreign policy objectives and must accept [those] of the executive and legislative branches").

Finally, since Article 25 of the Warsaw Convention applies and the liability cap is lifted, plaintiff or a representative may recover for all the damages suffered. "[T]he Convention deliberately allows common law countries to subject air carriers to unlimited liability in cases of willful misconduct." In re Lockerbie, 928 F.2d at 1271 (citing G. Miller, Liability in International Air Transport 80 (1977)). That liability should properly include compensation for the pain and suffering a plaintiff actually experiences.

Allowing survival damages for pain and suffering comports with the main policy goals of general tort law -- full deterrence and compensation -- without interfering with the goals of the Warsaw Convention itself. These goals are compatible -- in fact, almost identical. Both are designed to provide full compensation for harm suffered and deterrence when the statutory limit of $75,000 does not apply.

The moral component of tort law is also vindicated by allowing full survival recovery. The jury award represents the sublimation of our own horror and our substitution, through imagination, for Mr. Ospina in his final moments. It is as if we ourselves are falling to our deaths. This constitutes our recognition of the importance of human life and dignity up to the moment of death. The compensation owed the dying Mr.

Ospina is one of his assets, which may be collected by his widow for his estate.

VI. CONCLUSION

The jury's award of damages for conscious pain and suffering damages for the period between Mr. Ospina's physical wounding and death is appropriate under the Warsaw Convention. The language of the Convention, federal common law as embodied in federal statutes, and state decisional and statutory authority support such awards. Conscious pain and suffering damages are neither speculative nor punitive, but rather compensate the survivor for the actual harm the decedent experienced.

All other awards and findings of the jury are fully supported by the evidence. The jury's verdict is confirmed. Defendant's motion to set aside or reduce the verdicts or for a new trial is denied.

This judgment closes the last chapter in MDL 727. All the cases arising from the Cairo-Rome-Athens terrorist attack on the TWA airliner have now been tried or settled. The clerk will notify the Judicial Panel on Multidistrict Litigation.

So ordered.

Dated: November 21, 1991
Brooklyn, New York

Jack B. Weinstein
United States District Judge